Petition

81-1459

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MADELINE T. POSTON,

Petitioner,

v.

WILLIAM F. BOLGER,
Postmaster General,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI

HELENE K. MONAT
5419-B Backlick Road
Springfield
Virginia 22151
(703) 642-9500

Attorney for Petitioner

On the Petition:

WILLIAM F. WALL
5419-B Backlick Road
Springfield
Virginia 22151

QUESTIONS PRESENTED

1. Whether federal employees who submit their claims of wrongful discharge to final arbitration thereby lose their statutory right under Title VII to a trial de novo in a subsequent civil action.

2. Whether federal employees are required to file a separate Equal Employment Opportunity (EEO) complaint for subsequent acts of reprisal committed while an earlier EEO complaint of retaliation is still under investigation by the agency.

LIST OF ALL PARTIES

The names of all parties appear in the caption of the case.

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OPINIONS BELOW

The unpublished opinions below appear at Appendices A and B.

JURISDICTION

On October 1, 1981, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court for the Eastern District of

Virginia, Alexandria Division. The petitioner's timely request for rehearing was denied on November 5, 1981. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 2000e-16(c) of Title 42 of the United States Code provides in pertinent part:

> [A]fter one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 1613.216(a) of Title 29 of the Code of Federal Regulations, regulating the conduct of EEO investigations, provides in pertinent part:

> The investigation shall include a thorough review of the circumstances under

which the alleged discrimination occurred, the treatment of member's of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant.

Section 1613.218(c)(2) of Title 29 of the Code of Federal Regulations, regulating the conduct of hearings, provides in pertinent part:

> Information having a bearing on the complaint or employment policy and practices relevant to the complaint shall be received in evidence.

Section 1613.262(b)(2) of Title 29 of the Code of Federal Regulations, regulating procedures for review of retaliation charges, provides in pertinent part:

> When a complainant, after completion of the investigation of his complaint under § 1613.216, requests a hearing and in connection with that complaint alleges restraint, interference, coercion, discrimination, or reprisal, the complaints examiner assigned to hold the hearing shall consider the allegation as an issue in the complaint at hand or refer the

matter to the agency for further processing under the procedure chosen by the complainant pursuant to paragraph (a) of this section.

STATEMENT OF THE CASE

BASIC ISSUE:

This is a Title VII case in which a federal employee was denied a trial de novo because she had consented to arbitration.

JURISDICTIONAL BASIS:

The District Court had jurisdiction over this case under 42 U.S.C. § 2000e-16 (c) because over one hundred and eighty days elapsed from the filing of an appeal with the Civil Service Commission without a final agency decision.

KEY BACKGROUND EVENTS:

March 5, 1974: Plaintiff discharged;

October 8, 1974: Informal counseling unable to resolve discharge issue;

October 14, 1974: Filed EEO charge alleging retaliatory discharge for filing EEO complaints;

November 13, 1974: Reinstated without back pay by arbitration decision;

December 16, 1974: Filed EEO charge alleging being denied right to her job by continued reprisals;

December 20, 1974: Resigned;

April 1975: October 14, 1974 complaint investigated--Mrs. Poston alleges forced to resign due to unbearable working conditions;

December 30, 1975: Agency finding of no discrimination based on sex;

December 14, 1974: Decision vacated and remanded for consideration of the issue charged--retaliation;

September 29, 1978: Scheduled hearing adjourned due to dispute over scope of the hearing;

November 1979: Notified that hearing would be postponed indefinitely;

February 4, 1980: Filed civil action.

THE ISSUES AT TRIAL:

At trial, Mrs. Poston sought judicial relief for two claims:

1. That her dismissal in March 1974 was in retaliation for filing three previous EEO complaints against her supervisors--Robert Brown and James Adair; and

2. That her resignation in December 1974 was a constructive discharge

since working conditions had been rendered intolerable by the reprisal actions.

*** Neither in her judicial complaint nor at trial did the plaintiff seek relief for events covered by the previous EEO decisions. The Fourth Circuit thought that she had.

DENIAL OF TRIAL DE NOVO:

The District Court accepted jurisdiction over both claims, but ruled that it would not consider the plaintiff's evidence regarding incidents that had been submitted to arbitration.

The Trial Judge rejected plaintiff's argument that Title VII rights are independent of the arbitration process. Relying on the findings of the arbitrator and prior EEO decisions, the District Court found for the Postal Service on both claims.

CONTENTIONS ON APPEAL:

The plaintiff argued on appeal that

the District Court's ruling is directly in conflict with the holding of this Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). In Alexander it was unanimously held that an employee's statutory right under Title VII to a trial de novo on his claim of unlawful discharge is not precluded by prior submission of his claim to final arbitration. 415 U.S. at 43, 54, 59-60. The plaintiff lost this argument.

CIRCUIT COURT'S MISTAKEN VIEW OF ISSUES:

The Fourth Circuit never addressed this central issue. This critical oversight was apparently caused by the Court's mistaken impression that the plaintiff was seeking judicial relief for the previous complaints. (App. B, pp. 1-3, 5-6) Therefore, the Court spent most of its time addressing an issue that was not in the case. (App. B, pp. 6-8)

*** The plaintiff sought to introduce evidence regarding the events covered by the previous EEO de-

cisions solely as relevant background evidence to support her claim that the discharge in March 1974 was the final link in a series of related reprisal actions.

FAILURE TO ADDRESS THE TRUE ISSUE:

At no time during the appeal did the Court of Appeals address the dispositive issue--whether the District Court's view that the plaintiff was bound by the findings of the arbitrator is directly contrary to this Court's holding in Alexander v. Gardner-Denver.

FACTS MATERIAL TO CIRCUIT COURT'S DISMISSAL OF CONSTRUCTIVE DISCHARGE CLAIM:

The Court of Appeals did not reach any of the errors raised regarding the claim of constructive discharge because it found, on the basis of Brown v. General Services Administration, 425 U.S. 820 (1976), that the District Court was without jurisdiction to hear that issue since it had never been

presented to the Postal Service. (App. B, p. 9)

KEY FACTS:

The plaintiff did not file a separate EEO charge for this claim. However, all of the alleged reprisals occurred before the investigation of her October 1974 complaint. The investigative report did in fact cover events through December 1974. The plaintiff explicitly requested in April 1975 that this claim be considered in conjunction with the one under investigation.

THE APPLICABLE RULE IN PRIVATE-SECTOR CASES:

In her petition for rehearing, the plaintiff contended that Fourth Circuit's ruling was directly contrary to governing regulations and applicable case law, pointing out that this Court and every Circuit Court in the nation has ruled as follows for private-sector employees:

*** The judicial complaint may encompass any unlawful conduct disclosed dur-

> ing a reasonable investigation of the charge on which jurisdiction is predicated, including any new acts occurring while the initial charge is pending before the agency. It is not necessary to file a second formal charge.

APPLICATION OF RULE TO FACTS:

The plaintiff argued that this rule was directly applicable to the facts of this case. All of the alleged reprisals occurred during the pendency of the initial charge and were directly related to it. Therefore, the District Court had jurisdiction and the errors raised should have been considered.

FEDERAL EMPLOYEES HAVE SAME RIGHTS:

The plaintiff pointed out that several courts have applied the same exhaustion standard to federal and private-sector employees. This conclusion follows naturally from this Court's decision in Chandler v.

Roudebush, 425 U.S. 840 (1976), that federal employees have the same right to a trial de novo as private-sector employees.

REGULATIONS REQUIRE THE SAME RESULT:

Government regulations also require the consideration of any unlawful practices discovered during the investigation of an EEO complaint and of any allegations of reprisals for filing the complaint which are brought up at the hearing on the complaint. 29 C.F.R. §§ 1613.216(a), 1613.218(c)(2) & 1613.262(b)(2). The plaintiff argued the application of these regulations in her petition.

DENIAL OF PETITION:

Nevertheless, the petition for rehearing was denied on Novermber 5, 1981 without addressing any of these arguments. (App. C, p. 1)

ARGUMENT

This case presents two major questions of law involving the rights of federal employees under the 1972 amending legislation to the Civil Rights Act of 1964 (Title VII). Neither question has been directly decided by this Court.

SUMMARY DISPOSITION MAY BE APPROPRIATE:

However, both questions are well-settled with regard to private-sector employees. This Court has also decided that federal employees have the same rights under Title VII as private-sector employees. Therefore, it seems clear that the same rules should apply to federal employees. Summary disposition of this case appears appropriate.

IN THE ALTERNATIVE:

The writ should be granted because of the need to clarify the rights of federal employees under Title VII since the decision in this case is in conflict with the rulings in other circuits.

I. THIS COURT HAS HELD THAT PRIVATE-SECTOR EMPLOYEES DO NOT LOSE THEIR RIGHT UNDER TITLE VII TO A TRIAL DE NOVO BY SUBMITTING THEIR CLAIM TO FINAL ARBITRATION.

THIS COURT HAS ALSO HELD THAT FEDERAL EMPLOYEES HAVE THE SAME RIGHTS UNDER TITLE VII AS PRIVATE-SECTOR EMPLOYEES.

THEREFORE, FEDERAL EMPLOYEES WHO SUBMIT THEIR CLAIMS OF DISCRIMINATION TO FINAL ARBITRATION DO NOT THEREBY LOSE THEIR RIGHT UNDER TITLE VII TO A TRIAL DE NOVO IN THE DISTRICT COURTS.

THE DECISION IN THIS CASE IS IN DIRECT CONFLICT WITH THE HOLDING OF ALEXANDER v. GARDNER-DENVER:

The District Court's rulings at several critical points in the trial that the plaintiff was bound by the findings of the arbitration decision is in direct conflict with the holding of this Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). In that case this Court addressed the identical issue presented in the present case--whether an employee loses his right to a trial de novo under Title VII by voluntarily electing to pursue his grievance to final arbitration.

The Court of Appeals for the Tenth Circuit had approved the District Court's rul-

ing that Alexander was bound by the arbitral decision and thereby precluded from suing under Title VII. This Court reversed. Finding that an employee's Title VII statutory rights are independent of the arbitration process, this Court held that the employee's claim should be considered de novo by the federal courts. 415 U.S. at 60.

SAME RULE APPLIES TO FEDERAL EMPLOYEES:

The only possible difference of any significance between Alexander v. Gardner-Denver and the present case is that Alexander was a private-sector employee. However, since it is now established under this Court's holding in Chandler v. Roudebush, 425 U.S. 840 (1976), that federal-sector employees are also entitled to a trial de novo in Title VII actions, it is clear that the holding of Alexander v. Gardner-Denver applies equally to federal employees.

RIGHT TO SHOW PRETEXTUAL REASONS FOR DISCHARGE:

In McDonnell Douglas Corp. v. Green,

411 U.S. 792 (1973), dealing with the order and allocation of proof in Title VII cases, this Court repeatedly emphasized the essential element of the employee's right to de novo judicial review: once the employer has articulated legitimate reasons for the conduct in issue, the employee must be given a full and fair opportunity to demonstrate by any competent evidence that the stated reasons were in fact a pretext to cover up for a decision that was in reality premised on unlawful motives. 411 U.S. at 804, 805 & n.18, 807.

PLAINTIFF WAS DENIED A TRIAL DE NOVO:

Mrs. Poston was denied this opportunity. Throughout the trial, the Trial Judge blocked the plaintiff's attempts to present evidence showing that the reasons given for her discharge were a pretext. The Trial Judge explicitly stated on several of these occasions that he would not consider such evidence because the plaintiff had consented to arbitration. At no time during the trial did the

District Court reverse its position that the plaintiff was bound by the findings of the arbitral decision.

REVERSAL IS REQUIRED:

There is absolutely no doubt that the plaintiff was not afforded a full and fair opportunity to show that the reasons given for her discharge were a pretext, as mandated by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Since the ruling which precluded de novo review of the plaintiff's claims is clearly contrary to the holding of Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Court of Appeals for the Fourth Circuit should be directed to vacate its decision and remand the case to the District Court for a new trial.

II. IN PRIVATE-SECTOR TITLE VII CASES THIS COURT HAS APPROVED THE WELL-ESTABLISHED RULE THAT THE JUDICIAL COMPLAINT MAY ENCOMPASS ANY DISCRIMINATION ASCERTAINED IN THE COURSE OF A REASONABLE INVESTIGATION OF AN EEO COMPLAINT.

FEDERAL EMPLOYEES HAVE THE SAME TITLE VII RIGHTS AS PRIVATE-SECTOR EMPLOYEES.

THEREFORE, FEDERAL EMPLOYEES ARE NOT REQUIRED TO FILE A SEPARATE COMPLAINT FOR ACTS OF REPRISAL REPORTED TO THE AGENCY DURING THE INVESTIGATION OF AN EEO COMPLAINT.

RULE IN PRIVATE-SECTOR CASES:

It has long been the rule in private-sector cases that the judicial complaint may encompass any discrimination like or reasonably related to the allegations of the initial EEO charge upon which jurisdiction is predicated. Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970). This rule includes claims arising from new acts occurring during the pendency of the charge before the EEOC. Oubichon v. North American Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973).

UNDER THIS RULE, THERE IS JURISDICTION:

Mrs. Poston notified the Postal Service of her constructive discharge claim on several occasions. For example, she filed an EEO complaint just before she resigned, alleging that she was being denied the right to her

job by the reprisals since she returned to work. (This complaint was improperly returned and never processed.) Most importantly, she expressly requested that these instances be considered in conjunction with the investigation of her October 1974 complaint. She even specifically informed the investigator that the situation became so unbearable that the only solution was to resign.

Applying the well-established rule to these facts, it is clear that the District Court had jurisdiction.

NINTH CIRCUIT CASE WITH IDENTICAL MATERIAL FACTS:

A virtually identical situation was presented in Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295 (9th Cir. 1981). Dosier had filed charges of retaliation in 1974 and 1976. Included in his judicial complaint were two additional acts of alleged retaliation that occurred in 1977.

Dosier had not filed an administrative charge for one of these additional incidents,

and the charge filed for the other had been rejected as untimely. Dosier contended that these indicents were part of a continuing scheme of harassment in retaliation for his prior charges and were properly before the court since they had occurred during the pendency of his original charges.

The District Court granted summary judgment for Miami Valley on the 1977 incidents because Dosier had not filed a timely separate charge. The Court of Appeals for the Ninth Circuit reversed, applying the rule accepted with minor variations by every circuit: the judicial complaint may encompass any discrimination reasonably related to the allegations of the initial charge, including new acts occurring during the pendency of administrative proceedings. 656 F.2d at 1300.

APPROVAL BY THE SUPREME COURT:

The rule in the Fourth Circuit for private litigants appears to be even more lib-

eral. See E.E.O.C. v. General Electric Co., 532 F.2d 359, 364-69 (4th Cir. 1976)(civil suit may include any discrimination developed in the course of a reasonable investigation of the initial charge, whether or not of a like or related type). This rule was expressly approved by this Court in General Telephone Co. v. E.E.O.C., 446 U.S. 318, 331 (1980): any violations ascertained in the course of a reasonable investigation of the charge are actionable.

SAME RULE APPLIES TO FEDERAL EMPLOYEES:

The same rule should apply to federal employees. As this Court determined in Chandler v. Roudebush, 425 U.S. 840, 841 (1976), a principal goal of the 1972 amending legislation to Title VII was to accord federal employees "the full rights available in the courts as are granted to individuals in the private sector." Adapting the rationale of Chandler v. Roudebush to the present case, since federal employees are entitled

to file a civil action under the same provisions that govern Title VII actions by private-sector litigants, it follows syllogistically that the same standards for exhaustion of administrative remedies should apply. 425 U.S. at 845-46.

Courts examining this question have in fact been unable to perceive any reason why a different standard of exhaustion should be required. Federal employees face identical administrative obstacles as private-sector employees. President v. Vance, 627 F.2d 353, 362 (D.C. Cir. 1980). Moreover, Congress intended to minimize, not increase, any disparity in the treatment of federal and private-sector employees. Clark v. Chasen, 619 F.2d 1330, 1334 (9th Cir. 1980).

Therefore, the courts have uniformly held that the same exhaustion standards apply. See, e.g., Williams v. Tennessee Valley Authority, 415 F. Supp. 454, 457 (M.D. Tenn. 1976)(same exhaustion requirements for class actions), aff'd, 552 F.2d

691 (6th Cir. 1977); Sylvester v. United States Postal Service, 393 F. Supp. 1334, 1340 (S.D. Tex. 1975)(same exhaustion requirements for determining allowable scope of judicial complaint), aff'd without opinion, 595 F.2d 1219 (5th Cir. 1979).

THIS RULE IS PARTICULARLY APPROPRIATE TO CLAIMS OF RETALIATION:

Under this standard, as developed in federal and private-sector cases, the District Court clearly had jurisdiction over the constructive discharge claim. Application of the rule that the judicial complaint may encompass new acts occurring during the pendency of the initial charge before the agency has been held particularly appropriate to claims of retaliation for filing the original charge. See, e.g., Ahmad v. Independent Order of Foresters, 81 F.R.D. 722, 729 (E.D. Pa. 1979)(where employee filed retaliation charge in May 1974 alleging continuing reprisals, court has jurisdiction over alleged retaliatory discharge

in November 1974 even though no new EEO charge was filed); Askins v. Imperial Reading Corp., 420 F. Supp. 413, 415 (W.D. Va. 1976)(allegations of retaliation which were not the subject of an EEO charge are sufficiently related to those charges to be included in the civil action).

GOVERNING REGULATIONS REQUIRED THE POSTAL SERVICE TO ACCEPT THE PLAINTIFF'S CLAIM:

It is important to note that jurisdiction over the constructive discharge issue is also mandated by the government's own regulations. For example, 29 C.F.R. § 1613.216(a) requires that the investigation of a timely charge "shall include a thorough review of ... any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant." (Emphasis added.)

On the very first day of the investigation, Mrs. Poston specified additional

reprisals, which she alleged were a continuation of the conduct complained of in the charge under investigation. She even requested that these additional acts be included in the consideration of her initial complaint.

As this Court said in Love v. Pullman Co., 404 U.S. 522, 526 (1972), to require the formal filing of new charges and begin again the administrative process under such circumstances "would serve no purpose other than the creation of an additional procedural technicality."

Furthermore, under 29 C.F.R. § 1613.218(c)(2), the complaints examiner at the administrative hearing was required to receive evidence regarding these additional incidents. He refused.

Under 29 C.F.R. § 1613.262(b)(2), he is also directed to either consider the additional claims of reprisals as an issue in the complaint at hand or refer it to the agency for processing. He did neither.

THE PLAINTIFF SHOULD NOT BE PENALIZED FOR POSTAL SERVICE MISTAKES:

The failure of the Postal Service to follow its own regulations certainly cannot be used against Mrs. Poston, who consistently attempted to get the Postal Service to consider this claim at the agency level. Chisholm v. United States Postal Service, 516 F. Supp. 810, 868 (W.D. N.C. 1980) (jurisdiction over issues which the employee sought to raise but the Postal Service refused to investigate).

Federal agencies cannot improperly narrow the focus of complaints at the administrative level and then claim that plaintiffs have failed to notify the agency of the full extent of the discriminatory actions. Ellis v. Naval Air Rework Facility, 404 F. Supp. 391, 395 (N.D. Cal. 1975).

THE POSTAL SERVICE HAD AMPLE OPPORTUNITY TO CONSIDER THE CLAIM:

The Postal Service was notified of the constructive discharge claim and had ample

opportunity to resolve this claim. Thus, the fundamental purpose of the exhaustion doctrine was met. See Love v. Pullman Co., 404 U.S. 522, 526 (1972)(doctrine satisfied if agency given opportunity to consider the complaint); E.E.O.C. v. American National Bank, 652 F.2d 1176, 1184-86 (4th Cir. 1981) (doctrine satisfied if agency given opportunity to correct its fault out of court).

CASE RELIED UPON BY FOURTH CIRCUIT DEALT WITH AN UNRELATED ISSUE:

The only case cited in support of the conclusion was Brown v. General Services Administration, 425 U.S. 820 (1976). That case involved the unrelated issue of whether Title VII provides the exclusive remedy for federal employees who fail to file a timely initial charge.

Brown had not filed until forty-two days after the incident. He simply failed to meet the thirty-day filing requirement. It is unchallenged that Mrs. Poston's October 1974 charge was timely. Therefore, the decision

in Brown has no bearing on the question presented in this case.

Every single case relied upon by the Postal Service in argument before the Court of Appeals dealt with whether the initial charge was timely. These cases are inapplicable. See Clark v. Chasen, 619 F.2d 1330, 1336 n. 17 (9th Cir. 1980)(Brown does not require a more demanding exhaustion standard for federal employees).

REVERSAL IS REQUIRED:

In accordance with well-established case law and governing regulations, the decision of the Fourth Circuit on this issue should be vacated.

NEW TRIAL REQUIRED:

The same errors of law raised with regard to the March 1974 discharge apply equally to the December 1974 constructive discharge. The same alleged errors were used to justify disciplinary actions over and over again. The Trial Judge again excluded

this evidence, stating on one occasion that he would not entertain it because Mrs. Poston returned to work voluntarily.

Since she was also denied a de novo review of this claim, the Fourth Circuit should be directed to remand this issue for trial. See Bragg v. Reed, 592 F.2d 1136, 1138 (10th Cir. 1979)(where the agency and the courts below have refused to consider the merits of the claim because they misconstrued their legal duty or the law, the higher courts should not hesitate to correct that error).

CONCLUSION

The two issues presented in this petition are important and straightforward. The critical facts are not in controversy: a federal employee was denied a trial de novo on both of her Title VII claims.

Under the same circumstances, a private-sector employee would have been entitled to a de novo review of both claims. This result is in direct conflict with decisions

of this Court and the principal goal of the 1972 amending legislation--according federal employees the same full rights in the courts as are available to private-sector employees.

PLAINTIFF'S CHIEF CONTENTIONS:

1. She was entitled to show that the asserted reasons for the disciplinary actions were a pretext. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-07 (1973).

2. She was denied this right because she had submitted her discharge to arbitration. Private-sector employees do not lose their statutory right to a trial de novo by consenting to arbitration. Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974).

3. The facts developed during the investigation of Mrs. Poston's October 1974 complaint revealed additional acts of alleged reprisals. Therefore, the Fourth Circuit would have found that the District Court had jurisdiction over the constructive discharge claim if she had been a private-sector employee. E.E.O.C. v. General

Electric Co., 532 F.2d 359, 364, 366 (4th Cir. 1976).

This Court would reach the same result. General Telephone Co. v. E.E.O.C., 318, 331 (1980).

4. Congress intended that federal employees were to have the same rights and meet the same exhaustion standards under Title VII as private-sector employees. Chandler v. Roudebush, 425 U.S. 840, 841, 848-49 (1976)

5. Other federal courts have so held. Clark v. Chasen, 619 F.2d 1330, 1334 (9th Cir. 1980).

6. The governing regulations are in accord with the case law--i.e., primary purpose of the EEO complaint is to trigger the investigation. E.E.O.C. v. General Electric Co., 532 F.2d 359, 364 (4th Cir. 1976). Thus, it is the investigation rather than the original complaint that determines the scope of the judicial complaint. See 29 C.F.R. § 1613.216(a).

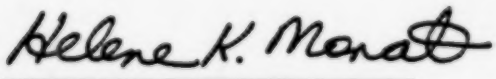
7. Therefore, the District Court properly took jurisdiction over both claims, but failed to accord the plaintiff the trial de novo to which she was entitled.

RELIEF REQUESTED:

The plaintiff respectfully requests that she be granted a new trial.

In the alternative, the petition for a writ of certiorari should be granted to resolve the disparity between the treatment of federal and private-sector employees under the same statute.

Respectfully submitted,



HELENE K. MONAT
5419-B Backlick Road
Springfield
Virginia 22151
(703) 642-9500

Attorney for Petitioner

On the Petition:

WILLIAM F. WALL
5419-B Backlick Road
Springfield
Virginia 22151

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MADELINE T. POSTON,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION NO. 80-94-A
WILLIAM F. BOLGER, Postmaster General of the United States,	:	
Defendant.	:	

MEMORANDUM OPINION AND ORDER

The plaintiff, a former United States Postal Service employee, brought this suit under Title VII of the Civil Rights Act of 1964 (42 US.C. § § 2000e-5(f)(3), and 2000e-16(c) alleging that her March 6, 1974 discharge from the Postal Service and the incidents leading up thereto were illegal acts of reprisal by her supervisors in retaliation for her previous filings of Equal Employment Opportunity (EEO) complaints alleging sex discrimination and reprisal in connection with her Postal Service employ-

ment.

She also claims her resignation from the Postal Service on December 18, 1974 constituted a constructive discharge by reason of the alleged unlawful reprisal activities of her supervisors.

She seeks both declaratory and injunctive relief, reinstatement as a Postal Service employee, with back pay and full seniority, and unspecified money damages for the physical strain and mental anguish she allegedly suffered at the hands of her supervisors.

The defendants denied the charges and claimed that Mrs. Poston voluntarily resigned from the Postal Service effective December 20, 1974.

The burden was upon the plaintiff to prove her charges by a preponderance of the evidence--this she failed to do. Therefore, her complaint must be DISMISSED, and

It Is So Ordered.

From the evidence presented, the Court

finds:

Mrs. Poston was hired on November 11, 1972 as a part-time "Distribution, Window and Mark-up Clerk" at the McLean Post Office.

She was assigned, in accordance with her job description, to learn the "scheme"--to work at the mail service counter, forward mail, and to periodically work on the loading dock sorting mail. All clerks at the McLean Post Office were required to perform these duties.

Being a part-time clerk, she did not have a rigid work schedule--the work schedule for such employees was always posted on the bullentin board on the Wednesday prior to its Saturday effective date--it was the employee's responsibility to check the bulletin board for her next week's work schedule.

Senior employees at the McLean Post Office had preference over junior clerks in selecting their daily work hours, days off and vacation time--the plaintiff had the

least amount of seniority of any of the clerks at the McLean office.

Mrs. Poston consistently requested vacations during periods that already had been selected by more senior employees--they were denied.

She requested a vacation between December 15 and December 30, 1973--due to the heavy workload during the Christmas season, this request was denied.

In May of 1973, Mrs. Poston was placed on a restricted sick leave, which required a physician's certification for claimed sick leave. Her sick leave was restricted because she had previously taken sick leave under suspicious circumstances, i.e., on Saturdays and other days when she was scheduled to work only four hours a day.

In early June of 1973, Mrs. Poston's doctor indicated that she could not work on the loading dock due to pain in her legs--she was assigned a desk job. When this work was exhausted, she was sent home on sick

leave until she could resume her work on the loading dock.

Mrs. Poston was repeatedly counseled for various mistakes and rule infractions, including collecting wrong amounts for box rent, entering wrong meter readings on Postal Service forms, and improper handling of the mail--she was suspended twice in 1973 for being AWOL. In October of 1973, she was suspended for unsatisfactory performance.

In February of 1974, Mrs. Poston was given an advance written notice of discharge because of her past counselings and suspensions, and additional financial irregularities--her annual step increase was denied because of her past record and the advance notice of discharge.

Mrs. Poston filed numerous EEO complaints, claiming that her supervisors in scheduling her work hours, assigning her a scheme, denying her vacation leave, placing her on restricted sick leave, assigning her to the loading dock, exces-

sively counseling her for minor infractions, suspending her, denying her annual step increases and discharging her were acts of sexual discrimination and/or reprisals for her previous EEO complaints.

Each of these EEO complaints, save one, resulted in findings of no discrimination and/or reprisal.

Mrs. Poston submitted her discharge to arbitration. After lengthy proceedings, the arbitrator concluded that the Postal Service was justified in terminating her employment, but nevertheless, reinstated her without back pay effective November 23, 1974, stating that, "she deserves another chance to demonstrate that she is a good employee."

Mrs. Poston returned to work but her work habits did not noticeably improve--she was counseled in December of 1974 for making an error in dating money orders (other clerks were counseled for making the same errors).

In addition, her annual step increase was denied because she had not provided a period of satisfactory work performance.

Whereupon she submitted her resignation to the Postmaster on December 18, 1974, effective December 20, 1974. She listed as the reason for her resignation: "Health--the 8 hr. window job and heavy lifting." She refused, even though she was advised that she could and should list as the reason therefor, the claimed harassment by her supervisors because of her filing complaints with the EEO.

Mrs. Poston tendered no evidence to support her contention that her immediate supervisor and the Postmaster were harassing her in her work or that they had counseled her without justification.

Her claim that the denials of her vacation requests were reprisals for her complaining to the EEO was based solely on her conclusions--she was not entitled to take her vacation whenever she wanted

to--she was not singled out for special treatment, nor treated any differently than any other clerk at the McLean Post Office--she made frequent mistakes in filling out Postal Service forms and in computing her cash and credit accounts--she took extensive sick leave and was AWOL on at least three occasions.

Her unsatisfactory job performance justified her being counseled--it was her supervisor's duty to so do. The EEO so found and this Court, upon the record here made, so finds.

Her discharge of February 1974, although justified, was reduced to suspension without pay--she accepted that decision and returned to work.

She was not forced to resign on December 18, 1980 [sic] --she then said for health reasons--the only other reason she gave during this trial was that she though she was being over-counseled by her bosses. That falls short of proving sexual discrim-

ination [sic] or that she was forced to resign because of her EEO complaints.

The Clerk will send a copy of this Memorandum Opinion and Order to counsel of record.

September 5, 1980.

/s/ Oren R. Lewis
Senior United States
District Judge

Entered: September 5, 1980

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1864

MADELINE T. POSTON, Appellant,

-versus-

WILLIAM F. BOLGER, as Postmaster General of the United States, Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued: June 3, 1981 Decided: October 1, 1981

Before WINTER, Chief Judge, RUSSELL and MURNAGHAN, Circuit Judges.

PER CURIAM:

Madeline Poston brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-16(c), alleging that her superiors in the U.S. Postal Service discriminated against her on the basis of her sex [sic] and retaliated against her because she filed Equal Employment Oppor-

tunity ("EEO") complaints. The district court found for the Postal Service. We affirm.

Mrs. Poston worked for the United States Postal Service in San Francisco for several years. After transferring to Maryland, she left her job when she moved to Virginia. In November 1972 she secured employment with the Postal Service's Sectional Center in Merrifield, Virginia and was assigned to the McLean Post Office as a part-time window, distribution, and mark-up clerk.

On May 21, 1973, six months after beginning work in McLean, Mrs. Poston filed EEO complaint No. 73-171 alleging that she had been sent to work on the loading docks as a reprisal for filing two earlier charges.[1] The Office of Equal Employment Compliance ("OEEC") found on July 17, 1973 that there was no reprisal and dismissed the complaint.

[1] The charges, evidently filed on May 5 and May 10, were informal charges.

On May 25, 1973, Mrs. Poston filed EEO complaint No. 73-193, alleging that she was being discriminated against on the basis of her sex in scheduling leave, getting sick leave, and taking coffee breaks. This complaint also resulted in an OEEC finding of no discrimination.

In June 1973, when Mrs. Poston's doctor indicated that she should not be on her feet, her supervisor, Robert Brown, put her on extended sick leave until she was healthy enough to return to work on the docks. Mrs. Poston responded by filing complaint No. 73-193 on June 12, 1973 claiming that Brown's action was reprisal for filing the earlier complaints. The complaint was supplemented on July 24, 1973. On August 1, 1974, the OEEC issued its final disposition--a finding of reprisal in that Brown had questioned Mrs. Poston about her complaints. A letter of reprimand was issued to Mr. Brown, but no further action was taken.

In September 1973, she was suspended for two separate periods: One for being AWOL; the second for unsatisfactory performance. On September 28, Mrs. Poston alleged in a union grievance that the suspensions were punitive and discriminatory. A labor arbitrator decided on May 23, 1974 that the Postal Service had just cause to take the disciplinary action.

The Postal Service issued Mrs. Poston a notice of dismissal on February 4, 1974, stating as grounds, inter alia, that her cash credit was out of tolerance. On February 15, 1974, Mrs. Poston again filed a union grievance and in November 1975 [sic], a labor arbitrator ordered her reinstated but without back pay. He found that there was no discrimination involved and that the discharge was warranted. He nevertheless ordered the reinstatement to give Mrs. Poston another chance to show she could be a good employee.

In the meantime on October 14, 1974,

Mrs. Poston had filed EEO complaint No. 75-119, claiming that her February discharge was a reprisal for the filing of her previous EEO complaints. This complaint was dismissed on December 30, 1975 with a finding of no discrimination, but was vacated and remanded in December 1977 because her complaint had been based on an allegation of reprisal and not discrimination. No final finding has been entered.

On December 18, 1974, Mrs. Poston resigned from the Postal Service, stating that she did so for reasons of ill health.

Mrs. Poston filed this action on January 28, 1980, claiming discrimination, reprisals for filing EEO complaints, and constructive discharge. After examing these facts and the allegations surrounding the EEO complaints and union grievances, the district court entered a finding that Mrs. Poston failed to prove the discrimination, reprisal, or constructive discharge claims.

Although the district court found for the Postmaster on the merits, it was not necessary for the district court to do so because it is apparent from the facts that, except for one claim, Mrs. Poston failed to file suit in a timely fashion.

Discrimination in federal employment is prohibited by 42 U.S.C. § 2000e-16(a). The section authorizes the filing of a civil suit under the following conditions: (1) within thirty days after notice of a final action taken by the employing agency or final decision on appeal to the Civil Service Commission, or (2) if a final decision has not been entered, after one hundred and eighty days have lapsed from the filing of a complaint with the employing agency or an appeal to the Civil Service Commission. 42 U.S.C. § 2000e-16(c).

This provision, the federal employees' analog to 42 U.S.C. § 2003-5(c), [sic] was first interpreted in Brown v. General

Services Administration, 425 U.S. 820 (1976). There the court found that this remedy was exclusive and pre-emptive, id. at 829, and affirmed the decision of the lower court dismissing the suit because it was not timely filed. Id. at 824. This rule is jurisdictional and has been strictly applied to employees in both the public and private sectors. E.g., Mohasco Corp. v. Silver, 447 U.S. 807 (1980); Ricks v. Delaware State College, 49 U.S.L.W. 4058, 4060 (U.S. Dec. 15, 1980); United Air Lines, Inc. v. Evans, 431 U.S. 553, 554-55 (1977); Eastland v. Tennessee Valley Authority, 553 F.2d 364 (5th Cir.), cert. denied, 434 U.S. 785 (1977); Adams v. Bailar, 426 F. Supp. 263, 265 (E.D. Va. 1976).

The appellant filed numerous complaints and grievances between May 1973 and October 1974. Mrs. Poston received notice of final disposition of all complaints except one, but failed to ask for judicial review of any decision rendered against her within the

thirty day period prescribed by 42 U.S.C. § 2000e-16(c). The district court was, with the one exception noted below, without jurisdiction to hear Mrs. Poston's complaint. To the extent that the complaint was based on claims resolved by the Postal Service or the Civil Service Commission, it should have been dismissed.

The one exception was complaint No. 75-119 filed on October 14, 1974, which alleged that her discharge was reprisal for her earlier EEO charges. This last claim was not resolved by either the OEEC or the Civil Service Commission. Under the statute, Mrs. Poston could have filed her action on this charge one hundred and eighty days after October 14, 1974. This she did when she filed this action in January of 1980.[2]

We have examined the record and are

[2] No reason has been offered for the extreme delay. Apparently a hearing on this claim had been scheduled as late as November 1979 but was cancelled for insufficient funds.

convinced that the October 14, 1974 claim has no merit. The district court noted that every previous complaint filed by Mrs. Poston except one resulted in a finding of no discrimination or no reprisal. The only complaint resolved in her favor was a minor victory resulting in the issuance of a letter of reprimand to her supervisor. We agree with the general conclusion of the district court that the evidence "falls far short of proving sexual discrimination or that she was forced to resign because of her EEO complaints."

Finally, we do not consider Mrs. Poston's claim that she was constructively discharged on December 18, 1974. This question was never presented to the Postal Service, hence she failed to exhaust her administrative remedies and may not litigate the issue in this court. Brown v. General Services Administration, 425 U.S. at 832. To the extent that this claim is based on the cumulative evidence from her previous complaints, we note

that the Postal Service was entitled to treat those incidents as lawful once Mrs. Poston failed to file within the thirty day period. United Air Lines, Inc. v. Evans, 431 U.S. at 558.

The judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIURCUIT

No. 80-1864

MADELINE T. POSTON,

Appellant,

versus

WILLIAM F. BOLGER, etc.,

Appellee.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a pool on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell with the concerrence of Chief Judge Winter and Judge Murnaghan.

For the Court,

/s/ William K. Slate, II

CLERK

Entered: November 5, 1981